United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1170

To be argued by
JERRY L. SIEGEL

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1170

UNITED STATES OF AMERICA,
Appellee,

—v.—

WILLIAM R. GOODJOIN
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

William Goodjoin appeals from a judgment of conviction entered on March 19, 1976, in the United States District Court for the Southern District of New York, after a three-day trial before the Honorable William C. Conner, United States District Judge, and a jury.

Information 75 Cr. 1121, filed November 17, 1975, charged Goodjoin with two counts of uttering United States Treasury checks containing false or forged endorsements of the payees, knowing the same to be false or forged, in violation of Title 18, United States Code, Section 495.

Pursuant to the defendant's pre-trial motion to suppress statements made by him to agents of the United States Secret Service, a hearing was held on December 18,

1975, following which the court denied the motion. (S. 205-11; Tr. 6-8).*

Trial commenced on December 22, 1975 and concluded on December 24, 1975, when the jury returned a verdict of Not Guilty on Count One and Guilty on Count Two. On March 19, 1976, Judge Conner sentenced Goodjoin to a term of imprisonment of up to 18 months, pursuant to 18 U.S.C. § 4208(a)(2),** the execution of which was stayed pending appeal.

Statement of Facts

The Government's Case

A. The Brewer Check.

The Government's proof at trial with respect to the transaction which was the subject of Count One, as to which the defendant was acquitted,*** established that the defendant, Goodjoin, was approached by a man named Eddie Sumpter who asked him if he "wanted to make some money" by cashing a check at Hickey's Bar on Kingsbridge Road in the Bronx. (Tr. 141). Two days

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* The abbreviation "S." refers to the transcript of the suppression hearing; "Tr." refers to the transcript of the trial; "GX" refers to Government Exhibits; and "A." refers to the Appendix, which does *not* contain the full transcript of either the trial or the suppression hearing.

** An amended judgment was filed on April 9, 1976, upon motion of the defendant and consent of the United States correcting the judgment to read "up to 18 months," rather than simply "18 months." (A. 5).

*** In assessing the sufficiency of the Government's proof, the evidence adduced with respect to this count may, of course, be considered. See *infra* at 17n*.

later, while Goodjoin and Sumpter were in Hickey's Bar, a man named Dunn * entered the Bar and gave Sumpter an envelope. Goodjoin later admitted that "Eddie [Sumpter] then turned away from me, borrowed my pen and wrote something, then he gave me the envelope in which I found a check for twelve hundred and eighty-six ($1286) dollars made payable to an Ora Brewer." (Tr. 141). Goodjoin then took the check to Michael Hickey, the owner of the bar and asked him to cash it, telling him "that the payee asked me to cash the check for him" (Tr. 141), and that the payee had signed it. (Tr. 42).

Michael Hickey, the owner of the bar, testified that upon being approached by Goodjoin, who asked him to cash the check

> I looked at the check and I said, "It's not your check". I said, "I can't cash it. It's a very large check. It's not yours." So he said, "This check belongs to a friend of mine at the Veteran's Hospital, a patient, and he asked me to cash it for him." I said, "no".
>
> So he left and about an hour later he came back with a letter, and I glanced at the letter and the letter stated that it authorized William Goodjoin to cash the check for Brewer. . .

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* Dunn in fact was employed in the mail room at the Veterans' Hospital on West Kingsbridge Road in the Bronx and the defendant entered into an agreement with Dunn whereby he would receive 40% of the face value of any check he cashed while Dunn would receive the remaining 60%. (Tr. 144). Although it is not clear at precisely what point in time this agreement was reached, the defendant described in his statement the method by which the scheme was to work. Basically, "Dunn takes these checks from patients that have died or left the hospital." (Tr. 144). Agent Marquez later testified that unless the recipient of a check indicated that he had not received a Government check or filed a claim, it would be unlikely that the Secret Service or any other Government agency would ever learn of the theft and uttering of the check and hence the crime might well go undetected. (Tr. 125).

> [I] says, "well, look, I will cash the check, but you will have to endorse it, also." I turned the check over and he signed his name on the back. (Tr. 40-41).*

Hickey then gave Goodjoin $286.70 and, upon going to the bank the following day, turned the remaining thousand dollars over to him. (Tr. 41). Goodjoin then turned the proceeds of the check over to Eddie Sumpter. (Tr. 142).**

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* The check which Goodjoin presented to Hickey bearing what purported to be the signature of Ora Brewer was Government Exhibit One. The letter which Goodjoin presented authorizing him to cash the check, also bearing the purported signature of Ora Brewer, was Government Exhibit Two.

** The defendant's own statement of the circumstances surrounding the cashing of this check is somewhat more sinister. He stated that after Hickey expressed his reluctance to cash the check, he and Sumpter engaged in a ruse to trick the bartender into believing Brewer had in fact authorized them to cash the check.

> "At this time, Eddie went outside to the telephone booth on the street and waited while I told Hickey that I was going to call the payee. I then called Eddie at the phone booth and he talked to Hickey and told him that he was Brewer and that it was all right to cash his check." (Tr. 142).

At trial, Hickey did not recall this phone call and Goodjoin points to this fact as evidence of the unreliability of his own statement. It is noteworthy, however, that at the suppression hearing, the defendant acknowledged on cross-examination that while he was attempting to cash the check, there was a phone call. His version of the events at the hearing was that:

> "Hickey picked up the phone and he said yes, right over here, you know, and he talked for a second or two and he hung up and came back and there was a letter in the envelope along with the check, and he looked at it and said, I don't have it all now, I just got the 200. He says, but you can come back tomorrow morning after ten o'clock and I will have the rest . . ." (S. 145).

While Ora Brewer, the actual payee of the check, was a patient in the VA hospital in July of 1974, he did not receive a social security check that was due him in the amount of $1286. He did not authorize Goodjoin or anyone else to receive, sign, or negotiate the check for him, and he did not even know Goodjoin. (Tr. 33-34). Finally, Brewer testified that it was his normal practice to take his checks to the patient fund in the hospital and to cash them there himself (Tr. 33).

B. The Berry Check.

With respect to the transaction which was the subject of Count Two, as to which the jury found Goodjoin guilty, the Government's proof showed that in early October of 1974, Goodjoin again met Eddie Sumpter, who asked him to cash another check. This check was a U.S. Treasury check made out to Thomas Berry in the amount of $620.00. (GX 4).

Goodjoin took this check and made a number of unsuccessful attempts to cash it. (Tr. 142). He then deposited it on October 9, 1974 into his own savings account at the Knickerbocker Federal Savings and Loan Association on Boston Road in the Bronx, after signing his name to the check under the forged signature of the payee, Thomas Berry. (Tr. 73-75).

On October 18, 1976, some nine days after depositing the check, Goodjoin personally withdrew $600 in cash from the account. (Tr. 77-78). Over the next four days, he withdrew another twenty dollars, leaving a balance of one dollar in the account, and did not thereafter use the account again. (Tr. 79).* By his own admission,

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* At the suppression hearing, the defendant explained that he had cashed both the Brewer and Berry checks in the belief that they belonged to hospital patients who had authorized

[Footnote continued on following page]

Goodjoin kept the entire proceeds of the check himself. (Tr. 142).

When the bank learned this check was "no good," Arthur Leis, the Assistant Bank manager, sent three letters to Goodjoin at his current address, all asking him to contact the bank at once about a matter of great important. (GX 9 and 10; Tr. 81-82). The third letter stated explicitly that the matter:

> "involves a transaction of a Treasury check that you deposited in your savings account. The payee of this check claims he never received the funds. He had filed a claim with the Treasury Department, who, in turn contacted us.
>
> If you continue to ignore letters sent to you, another course of action will be taken." (GX 10; Tr. 82-83).

There was no response whatsoever by Goodjoin to any of the letters. (Tr. 83, 85-86).

Thomas Berry, the payee of this second check, who was living at the VA hospital, did not receive one of his October, 1974 monthly disability checks. (Tr. 70). He did not authorize the defendant nor anyone else to receive, sign, or negotiate the check for him, and he did not know Goodjoin, Sumpter or Dunn and certainly did not authorize them to receive, sign or negotiate his check. (Tr. 70-71). When Berry received checks, he nor-

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Sumpter and Dunn to cash them. (S. 105, 151). The patent falsity of this explanation became apparent at trial when Hickey testified that Goodjoin told him that Brewer was a friend of his, had asked him to cash the check, and had signed it. Similarly, the absurdity of the defendant's explanation with respect to the second transaction was revealed when the evidence at trial showed that he deposited the check in his personal account, left it there for some nine days, and ultimately kept the proceeds himself.

mally took them personally to the finance office within the hospital and cashed them himself. (Tr. 69-70).*

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* In his brief defense counsel states that:

> "The defendant was willing to stipulate that both Mr. Brewer and Mr. Berry's signature had been forged. However, the government, apparently recognizing the impact these men, who were both paraplegics, would have upon the jury, rejected this offer and insisted upon calling both Mr. Brewer and Mr. Berry representing to the Court that these witnesses would also offer testimony going to the question of knowledge (94A). Of course, no attempt was made to elicit such testimony. (Brief at 15n).

This statement is totally in error and demonstrates the failure of defense counsel to perceive the thrust of this evidence at trial. During the suppression hearing, Goodjoin testified that he cashed these checks in the belief that the patients had actually asked Sumpter and Dunn to cash them because they were unable to do so on their own. (S. 105, 151).

Anticipating the repetition of this incredible story at trial, the Government called Brewer and Berry not only for the limited purpose which counsel ascribes, namely to show that the signatures were in fact forgeries and that they did not authorize anyone else to sign or negotiate them, but also to demonstrate, *inter alia*, (1) that when Goodjoin told Hickey that Brewer was a friend of his, and that he had asked him personally to cash the check after signing it, the defendant was lying, (2) that the defendant cashed two very substantial checks for two total strangers, and (3) that these men could and did cash their own checks by themselves within the hospital.

The latter point, the thrust of which defense counsel failed to recognize until it was spelled out in the Government's summation, seriously undermined the defendant's claim that he believed the patients asked to have their checks cashed outside the hospital. Both Brewer and Berry testified that there was a facility within the hospital for patients to cash their checks and that they normally cashed their own checks there personally. (Tr. 33, 69-70). The Government also proved that Goodjoin had been employed in that same VA hospital. (Tr. 39). Having worked there, the Government argued it was likely that the defendant was aware of the hospital's patient check-cashing faiclities, and therefore that he was lying when he claimed he accepted these checks from Sumpter and Dunn believing that these patients wanted them cashed outside the hospital. (Tr. 253-54, 264). Accordingly, this testimony went directly to the question of knowledge, as the Government stated at the outset. (Tr. 30).

C. Goodjoin's Statements.

Dario Marquez, a Special Agent of the Secret Service, testified to the events of February 7, 1975 including the oral and written statements made by the defendant: Agent Marquez and Agent George Hemmer met Goodjoin at Hickey's Bar pursuant to a phone call made to them by Goodjoin the night before. In that phone conversation, Goodjoin had indicated that there was a check forgery ring operating at the VA Hospital and that Dunn, who was the one who stole the patients' checks, had asked him to cash some of them. (Tr. 88-89).

At Hickey's Bar, Goodjoin agreed with the agents to meet with Dunn while wearing a small transmitting microphone, in an effort to get a check from him. Goodjoin then went into the hospital and met with Dunn, who did not have any checks at that time, but told Goodjoin that he would contact him later. (Tr. 100, 144).

After Goodjoin exited the hospital, the agents asked him if he would come down to the office with them and tell them about the check-cashing activities at the hospital. While driving to the office, Goodjoin began talking about Dunn, the hospital and the case generally, causing the agents to become suspicious about Goodjoin's involvement in the check-cashing operation. (Tr. 101-02).*

Once at the office, Goodjoin was advised both orally and in writing of his *Miranda* rights, at which time he

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* The transmitter slipped from the defendant's neck to his waist, and the agents were unable to hear any actual conversation between Dunn and the defendant. (Tr. 99).

* The agents told the defendant they did not want to talk about the case in the car and upon arriving at the office immediately advised him of his constitutional rights. (Tr. 101-02). No statements made by the defendant in the car were offered at trial.

signed a written form acknowledging that he had been advised of and understood his rights. He was then asked orally and in writing whether he wished to waive those rights and speak with the agents, which he did. (Tr. 102-04; GX 11). The defendant then proceeded to tell the agents about the stolen check ring, and explained how he became involved with Dunn. For the first time, Goodjoin told of his own check-cashing activities at Hickey's Bar and at his bank during the previous year. (Tr. 104-09).

After Goodjoin described his acquisition and negotiations of four checks, two of which were the subjects of Counts One and Two, and the manner in which the ring operated generally, including the sharing of profits (Tr. 104-06, 109), Goodjoin and the agents went through the sequence of events again, reducing them to a three-page written statement. (Tr. 111, 141-44; GX 12). The defendant and both agents then signed and dated each page of the statement.*

When asked on February 7th why he had come forward and made these admissions, Goodjoin stated that he knew the Government would trace the checks to him; that it was only a matter of time before he was caught;**

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* At the suppression hearing, the Government proved that approximately four months later on June 10, 1975, the defendant was arrested and brought to the courthouse to be arraigned. At that time, he was again advised of his constitutional rights and executed a form acknowledging and waiving them. (S. 39). He then reread and affirmed the same three-page statement, again initialing and dating each page. (S. 39-40). The Government did not offer this evidence at trial in view of its cumulative nature.

** At the suppression hearing, Goodjoin claimed that he contacted the agents when he was called on February 7 by Hickey who had received a letter from his bank indicating the check was stolen. (S. 61, 65, 82). At trial, however, the Government intro-

[Footnote continued on following page]

and that by coming forward he hoped his cooperation would be taken into consideration. (Tr. 117). Goodjoin was not arrested after making this February 7th statement because the agents had no checks or any other information corroborating his statements, but he was finger-printed and photographed * and handwriting exemplars were taken. (Tr. 114, 118, 193-95). Agent Marquez testified that throughout this period Goodjoin acted normal in all respects and gave no indication of intoxication. He walked, spoke, and appeared in all respects normal. (Tr. 114-15, 127).

Thereafter, Goodjoin was driven home. The agents stopped on the way, at the defendant's request, to permit him to purchase a bottle of liquor, which he opened and from which he drank. (Tr. 126). Upon arriving at home, the defendant located his bankbook (GX 6), which he had previously mentioned to the agents, and showed them the $620 entry he made when depositing the Berry check in October 1974. (Tr. 126).

The Defense Case

The defendant called one witness, but did not testify himself.

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duced the letter to Hickey from the bank, dated March 7, 1975, and Hickey testified he learned of the problem only upon receipt of the letter. (GX 3; Tr. 44).

The defendant also claimed that he knew the checks were stolen at that time because of a letter he had received from his own bank. (S. 98-99, 111). The evidence at trial, however, showed that this letter was not sent by the bank until March 27, 1975. (GX 9; Tr. 81-82).

* The photographs were introduced in evidence as GX 13, 13A and 13B. The handwriting exemplars were introduced in evidence as GX 14.

Daniel O'Leary, the owner of O'Leary's Bar, testified that he cashed a check for the defendant on one occasion under circumstances similar to that described in the defendant's statement (Tr. 143), but that the check was made out to the defendant and not to a third-party.* (Tr. 208-09). O'Leary further testified that on 40 to 50 different occasions, he had seen the defendant drink between 10 and 14 double shots of Black and White Scotch, and that afterward Goodjoin did not slur, stagger, or otherwise appear to be intoxicated, and in fact "acquits himself quite well on the pool table" after drinking. (Tr. 210). O'Leary further testified that although Goodjoin was "easily led" when he drank, he remained honest and forthright even after drinking 10 to 14 double shots. (Tr. 215).

Finally, Goodjoin introduced a letter indicating that he became a patient in an alcoholism treatment program as of April 15, 1975. (Tr. 223).**

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* As noted, the statement described two other transactions in which the defendant admitted to having engaged. The Government was precluded from exploring these transactions as similar acts (Tr. 106-08), did not offer any evidence involving these incidents beyond the statement itself, and did not mention them in summation.

** It was conceded by defense counsel that Goodjoin was not intoxicated at the time he received and uttered the two checks in question. (Tr. 230). Thus, the defendant's evidence was offered solely to show that he was intoxicated when he made the statements to the agents and that the statements were inaccurate.

ARGUMENT

POINT I

The Evidence Was More Than Sufficient to Support The Jury's Finding That Goodjoin Uttered The $620 Check, Knowing The Endorsement Was Forged.

Goodjoin contends that "there is absolutely no evidence in the record from which one can reasonably conclude that the defendant knew the endorsement on the $620 check had been forged when he cashed it in October of 1974" (Brief at 14), and therefore that the evidence of his guilt was insufficient as a matter of law. This claim is plainly in error, for, aside from the defendant's own admissions showing guilty knowledge, there was abundant circumstantial evidence from which the jury could properly find such knowledge.

It is well settled in this circuit, that the test of the sufficiency of the evidence is

> "whether upon the evidence, giving full play to the right of the jury to determine credibilty, weigh the evidence, and draw justifiable interferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt."

United States v. *Frank*, 494 F.2d 145, 153 (2d Cir. 1974); *accord*, *United States* v. *Freeman*, 498 F.2d 569, 571 (2d Cir. 1974); *United States* v. *Taylor*, 464 F.2d 240, 242-45 (2d Cir. 1972). Moreover, in applying this standard to determine sufficiency, the evidence must be viewed in the light most favorable to the Government. *United States* v. *Gerry*, 515 F.2d 130, 134 (2d Cir. 1975); *United States* v. *Floyd*, 496 F.2d 982, 987 (2d Cir.),

cert. denied, 419 U.S. 1069 (1974); *United States* v. *McCarthy*, 473 F.2d 300, 332 (2d Cir. 1972). So viewed, there is no question but that the evidence in this case permitted a reasonable mind fairly to conclude guilt beyond a reasonable doubt.

At the outset, it must be noted that even under the most sanguine view of the circumstances surrounding the uttering of the $620 check by the defendant, indications of impropriety abound. Briefly, Goodjoin received a substantial U.S. Treasury check made out out to a person he did not know and thereafter made numerous efforts, all unsuccessful, to cash the check. The defendant then deposited that check in his own personal account and left it there for some nine days before drawing on the funds.* He thereafter kept the proceeds of the check for his own personal use.

The fact that the defendant retained the funds for his own personal use, standing alone, is glaring evidence of the defendant's guilty knowledge. Defense counsel artlessly attempts to parry the thrust of this evidence by claiming that although the defendant did not return any of the proceeds, "this has nothing to do with the issue whether or not the defendant knew the check contained a forged endorsement." (Brief at 16). The fact that Goodjoin simply pocketed the proceeds of a $620 check

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* Arthur Leis, assistant Vice President of the Bank, testified that such a check would normally clear in five business days. Despite this, the defendant did not draw on the funds for nine days. This fact further undercuts the defendant's claim that he believed he was cashing the check for a hospital patient who could not cash it himself, since in a legitimate transaction of this sort one would presumably have sought to return the funds to the patient as soon as possible. In addition, the defendant made no effort to contact the payee, informing Sumpter of the delay only when aked by him about the check. (Tr. 142).

made out to a total stranger can be read to mean only a very few things, all of them either fatally incriminating or utterly preposterous. Either Goodjoin (a) believed that a total stranger decided to present him, through Sumpter, with a $620 gift out of the clear blue, (b) decided to simply embezzle the proceeds, or (c) kept the money, knowing the payee had not authorized the negotiation of the check or endorsed it in the first place. A reasonable mind could clearly and fairly conclude as the jury found, that the defendant knew the check was wrongfully taken and the payee's signature falsified or forged, when he deposited it in his personal account.*

Additional independent evidence of the defendant's guilty knowledge is his own admission as to the manner in which the check-cashing scheme operated through Dunn. As described in his statement:

> "According to my knowledge, Dunn takes these checks from patients that have died or left the hospital. In addition, Dunn and I have an agreement that if I cash a check, I will receive 40% of the face value of the check while Dunn receives the remaining 60%." (Tr. 144).

It is hard to imagine stronger evidence of defendant's guilty knowledge that a direct admission such as this.

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* Counsel appears to distinguish between knowledge that the endorsement was false or forged and knowledge that the actual payee had not authorized the negotiation of the check. While it is of course possible that the actual payee might endorse the check without authorizing its negotiation, the defendant thereafter somehow coming into possession of it, a reasonable mind could fairly conclude from the fact that the defendant knew the true payee did not authorize negotiation that he knew that the signature on the check was false or forged. See *United States* v. *Boules*, 428 F.2d 592, 597 (2d Cir.), *cert. denied*, 400 U.S. 928 (1970); *United States* v. *Sullivan*, 406 F.2d 180, 186-87 (2d Cir. 1969).

In attempting to evade this very damaging evidence, defense counsel argues (1) that the defendant got the check from Sumpter, not Dunn, "and there was absolutely no evidence of any relationship between them", [Dunn and Sumpter] (Brief at 17), and (2) that there is nothing in the statement which indicates when the defendant acquired this knowledge or when he entered into this agreement. Both arguments must be rejected out of hand.

There clearly was evidence of a prior illegal relationship between Dunn, Sumpter and the defendant. The evidence showed that the defendant got the first check in July of 1974 from Eddie Sumpter, who was given the check by Dunn in the defendant's presence in Hickey's bar. This occurred two days after the defendant had indicated that he "needed money" and that he would cash the check for some money. (Tr. 141). A reasonable mind could clearly and fairly conclude from this evidence that the defendant had entered into the above-described agreement and had the requisite knowledge when he later uttered the second check.* See *United States* v. *Brown*, 495 F.2d 593, 597 (1st Cir.), *cert. denied*, 419 U.S. 965 (1974); *United States* v. *Calabro*, 467 F.2d 973, 981 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973).

Further evidence from which guilty knowledge was circumstantially proven, independent of the defendant's statement, was his failure to respond to any of the urgent letters from the bank informing him that the actual payee had not received the funds and asking him to contact the bank manager. (Tr. 83). The defendant's

* Defense counsel should be somewhat loathe to make this argument at all, for although the evidence was not before the jury, it must be noted that at the suppression hearing the defendant himelf claimed that he got the $620 check directly from Dunn in the mail room and not from Sumpter. (S. 151).

actions were clearly not those of an innocent man who, as the defense sought to portray him, learned of the illegal nature of the transaction only after having cashed the check.*

Still other evidence of the defendant's guilty knowledge includes:

> (1) the defendant's oral statement to the secret service agents that he was "willing to produce the other players in this check-forgery ring," (Tr. 117) because he knew they would eventually trace the Government checks and that he came forward to help the Government in the hopes that his co-operation would be taken into consideration.
> (2) The fact that the defendant engaged in such conduct on four separate occasions. (Tr. 141-44).

Finally, it must be noted that, although the jury did not convict the defendant on the first count, charging him with uttering the $1,286.70 check, the jury was entitled to consider the evidence relating to that Count in reaching its verdict as to Count Two, *United States* v. *Lubrano*,

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* Again the defendant was caught up in a series of lies on this point at the suppression hearing. Goodjoin claimed at the hearing that he learned the checks were stolen and forged when Hickey, who had gotten a letter from his bank, told him so on February 7, and it was at that time that he called the Secret Service to report it. (Tr. S. 61, 65, 82). At trial, the Government introduced testimony and the letter which Hickey received from the bank informing him of the forgery, which was dated March 7, 1975 (GX 3; Tr. 44). This both demonstrated the falsity of the defendant's testimony and showed that the only way the defendant could have known the checks were stolen and forged on February 7, 1975, was as a result of his own knowledge since the earliest letter from his own bank was dated March 27, 1975. (Tr. 81-82; GX 9 and 10). The defendant chose not to testify at trial.

529 F.2d 633, 636 n.1 (2d Cir. 1975).* That evidence showed that in cashing the first check (1) the defendant probably saw Sumpter forge the payee's signature on the check after receiving it from Dunn and borrowing the defendant's pen (Tr. 141), and (2) that the defendant lied to the bartender about the check, claiming first that Ora Brewer was a friend of his who had asked him to cash the check and second that Ora Brewer had actually signed the check. (Tr. 40, 42, 141).

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* While the court in *Lubrano* held that an acquittal on a substantive count does not preclude reliance by the jury upon facts relevant to that count in evaluating the sufficiency of the evidence as to a conspiracy count, the logic of that opinion applies with equal force to the evaluation of the sufficiency of the evidence as to another substantive count, particularly where the conduct which is the subject of the latter count occurs subsequent to that at issue in the count as to which the jury acquitted. See *United States* v. *Zane*, 495 F.2d 683, 690-93 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974); *United States* v. *Sisca*, 503 F.2d 1337, 1344 n.9 (2d Cir.), *cert. denied*, 419 U.S 1008 (1974).

As the court in *Zane* recognized, an acquittal is not necessarily a finding that the conduct alleged did not occur but only that the government failed to prove all elements of the offense beyond a reasonable doubt, and may not even mean that much, *see United States* v. *Maybury*, 274 F.2d 899, 902 (2d Cir. 1960). Here the jury might well have found that the events charged in Count One occurred as the Government alleged, particularly since that evidence was virtually unrebutted, but acquitted because unlike the second transaction in which the defendant retained the proceeds of the check, he returned the proceeds of the first check to Sumpter, thus rendering the showing of participation in the scheme less certain.

In this case in particular, it should be noted that as to the first count, evidence thereof would be admissible as to Count Two as a prior similar act, which the Government would have to have proven by only a preponderance of the evidence, *United States* v. *Leonard*, 524 F.2d 1076 (2d Cir. 1975), and therefore this court is not precluded by the jury's acquittal thereon from considering this evidence in reviewing the sufficiency of that evidence on Count Two. *United States* v. *Finkelstein*, 526 F.2d 517, 527 (2d Cir. 1975).

The element of knowledge may be often proven by circumstantial evidence alone. *United States* v. *Sullivan*, 406 F.2d 180, 186-87 (2d Cir. 1969). See *United States* v. *Bowles*, *supra*; *United States* v. *Bottone*, 365 F.2d 389, 392 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966). In this case, the Government demonstrated knowledge through abundant direct and circumstantial evidence, which quite plainly permitted a reasonable mind fairly to conclude guilt beyond a reasonable doubt.*

POINT II

The Court Did Not Abuse Its Discretion in Denying the Defendant's Motion to Suppress His Statement.

Prior to trial, defense counsel moved to suppress all evidence, principally the written statement, given by the defendant to agents of the Secret Service on February 7, 1975, claiming the defendant's actions were not voluntary because he had been intoxicated at the time. On December 18, 1975, four days prior to trial, the court conducted an evidentiary hearing on this motion, following which it found Goodjoin to have acted voluntarily, and denied the motion. (S. 205-11; Tr. 6-8). Goodjoin now claims that

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* Even if the evidence described above were deemed insufficient, the court also instructed the jury that the requisite intent could be found if the jury determined beyond a reasonable doubt that the defendant had "deliberately closed his eyes to what would have been obvious to a reasonable man in his position", or that he "did act in reckless disregard of facts that were known to him at the time he cashed the checks." (Tr. 356). On this evidence the jury could clearly have so found. See *United States* v. *Bright*, 517 F.2d 584 (2d Cir. 1975).

the trial court abused its discretion in denying this motion.*

At the hearing the Government called Secret Service Agent George Hemmer, who was present with Agent Marquez during the events of February 7, 1976, as previously described, *supra* at . . . .). The Government also called Agent McLain, who arrested Goodjoin on June 10, 1975. He testified that on June 10th, Goodjoin, after being advised of and waiving his rights, reread, reaffirmed and signed each page of his February 7th statement (S. 39-44). The agent further testified that after Goodjoin was yet again advised of and waived his rights, he made a number of statements corroborating his original statement to an Assistant United States Attorney who wrote the statements down. Thereafter, the defendant testified, following which the Government called Agent Marquez in rebuttal.**

In denying Goodjoin's suppression motion, the court found first that on February 7, 1975 the defendant was advised of his constitutional rights and that "he voluntarily and knowledgeably waived those rights and that that waiver was also the product of a meaningful act of

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* Goodjoin asserts repeatedly throughout his brief that his statement was the "only" evidence of the knowledge before the jury (Brief at 3, 15, 19), a claim which is clearly untenable in light of the record. See pages 12-18, *supra*.

** Agent Hemmer did not in fact recall that Goodjoin had agreed to wear a recording device and meet with Dunn that day, thinking that they had gone directly from the bar to the office to talk. (S. 27). Defense counsel makes much to do over this, despite the fact that upon realizing the omission, the Government immediately rectified the agent's error by calling Agent Marquez who, having checked his daily report, explained the events as described herein. Agent Marquez candidly explained the prior omission (S. 195-96), and was cross-examined about it both at the hearing and at trial.

volition." (S. 210). Secondly, the court further found that:

> "I conclude that at the time the defendant, William Goodjoin, made the statements to officers Hemmer and Marquez and read over the transcript of those statements which Agent Hemmer had typed up and signed that statement, he was alert, aware, cognitive, and rational, and that his statement and his execution of the transcript of that statement were the products of a meaningful action of volition within the contemplation of *United States* v. *Silva*, 418 F.2d 328 (2d Cir. 1969)." (S. 209).

The court went on to explain at some length the reasons for its conclusions, which were (1) the implausibility of the defendant's testimony about his intoxication, and the uncanny selectivity of his memory of the day's events, (2) the credibility of the agents' testimony about the defendant's condition, including photographs and writing samples of the defendant which corroborated this testimony, (3) the detail and fundamental accuracy of the statement made by the defendant that day, and (4) the reaffirmation by the defendant of that statement on June 10, 1975. A brief examination of each of these four factors reveals that far from having abused its discretion, the court reached the only plausible conclusion which could arise from the evidence, namely that the defendant's actions in waiving his rights and making the statement were knowing and voluntary.

First, Goodjoin gave a totally unbelievable explanation of his conduct that day, replete with obvious exaggerations and several outright lies. According to the defendant, he consumed the following beverages on February 7, 1975: "a bottle of wine", (S. 61); two separate pints of Thunderbird wine (S. 87, 92); "a couple of shots" (S. 62); a half bottle of Bacardi rum (S. 63-64);

"a couple of more drinks" (S. 64); "some more to drink" (S. 64); "a chaser glass full of rum" (S. 66); two or three more 8-ounce glasses full of straight rum, without ice (S. 67, 95)—all of this before the agents arrived and met with him early in the afternoon—followed by a fourth 8-ounce glass full of rum which he was drinking when the agents arrived. (S. 67). As the court noted, in order to credit Goodjoin's testimony, it "wuold have to believe that he has a most unusual capacity for drinking wine and rum and not showing it." (S. 207).

Even more incredible than Goodjoin's claimed capacity for liquor was the selectivity of his memory of the events of February 7, 1975, and it was this selectivity of memory to which the court gave substantial weight in its decision to credit the testimony of the agents to the extent it conflicted with the defendant's. (S. 207). Despite the incredible consumption of alcohol on February 7th claimed by the defendant, he was able to recall and testify at the suppression hearing to virtually every detail of his speech and conduct that day except during the period he was at the agents' office. Thus, he was able to testify to the prices, brands, and quantities of the liquor he purchased that day (S. 87-103), the names, numbers, and positions of the people in Hickey's bar during his several claimed visits there during the day (S. 94-95, 100-01),* the names of various people he saw or spoke with that day and the details of their conversations (S. 82, 90-94),** the precise times and street routes which he fol-

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* The court noted that the defendant failed to produce a single witness who could corroborate his version of the day's events despite their admitted availability. (S. 210).

** Goodjoin clearly lied when he testified that he originally called the agents that day after Hickey had called to tell him that he had gotten a letter from his bank informing him that the check was forged. (S. 61, 65, 82).

[Footnote continued on following page]

lowed in he course of his activities (S. 87, 90, 92, 94, 95, 103, 111), the side of the street and the direction in which the agents' car was parked (S. 68), the details of his conversations with the agents, (S. 68-69, 97, 99, 102-04), and the fact that he was reading the comics in that day's New York Daily News while waiting for the agents to arrive. (S. 98, 101). He also remembered in great detail his activities in the hospital while wearing the transmitting device. (S. 6[illegible], 103-05, 107-09, 112-14). Similarly, after going to the agents' office and making and signing the various documents and statements, Goodjoin was able to recall the details of his ride home, including the route taken (S. 74), the location of the liquor store, the amount of liquor he consumed (S. 74), and the events at his house, including a conversation with the agents about one of his own checks which he claimed had been stolen from the hospital, and his bankbook. (S. 77).

Although the defendant was able to recall these events vividly, he claimed to be unable to recall any of the critical events during the period in which he was advised of and waived his rights and made the statements. Thus, while he was able to identify his signature on the waiver form and on the statement itself, he could not remember actually signing either of them (S. 70, 118, 72).* He

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As it turned out, Hickey did not receive that letter until March 7, 1975 and only thereafter did he contact Goodjoin about the check. (Tr. 44; GX 3). He also lied when he claimed that he knew the checks were stolen at the same time because of his receipt of a letter from his bank. (S. 69, 98-99, 111). At trial, th evidence showed that this letter was not sent until March 27, 1975. (GX 9; Tr. 81-82).

* He did, however, testify that the signatures on those documents was his "drunk" signature. (Tr. S. 70-72). At the trial and at the hearing, the Government introduced samples of the defendant's signature on (1) exemplars (S. 157-59; GX 14; Tr. 193-95), (2) the checks themselves, and (3) the statement and waiver forms, in order to permit comparison of these allegedly "drunk" and "sober" signatures. (GX 1, 4, 11 and 12).

identified a photograph as one being taken of him (S. 115) and remembered that he was fingerprinted at that time, (S. 117-18) but cuold not remember whether or not he spoke with the agents about the checks. (S. 118). He was also unable to recall whether he read anything while he was at the office (S. 118), or whether Agent Marquez read anything to him from a form that day. (S. 120). Finally, he testified that the first time he saw his three-page statement was when his attorney showed it to him (S. 121), although he acknowledged his signature appeared on the pages of the document. (S. 121).

In light of the defendant's incredible version of his activities of that day and his remarkably selective recollection of events, it is hardly surprising that the court chose to credit the testimony of the agents rather than of the defendant. (S. 207).

The second factor which prompted the court to find the defendant's actions to have been knowing and voluntary was the description given by the agents of the defendant that day. (S. 13-14, 16-17, 183-184). As the court summarized it:

> "[T]he conduct of the defendant was in all respects normal. His speech was normal and not slurred. His gait was normal in all respects and there was nothing in his conduct to suggest that he was inebriated or in any way incapacitated or in less than full control of his motor functions and mental facilities." (S. 206).*

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* While the defendant makes much ado over the failure of the agents to ask him whether he had had anything to drink, it is hardly surprising that they did not since the defendant appeared in all respects normal and gave no hint of a possible drinking problem until his request that they stop at a liquor store on the trip home. (S. 29-30).

The court further noted that Goodjoin looked no different in person at the hearing than he did in the photograph taken on February 7, 1975. (Tr. 6).*

Thirdly, the court also found that the fact that the defndant was able to make so detailed a statement on February 7th, which was "accurate in so many respects" (S. 206), was "further evidence of the mental capacity and competency of the defendant at the time the statement was made." (S. 206; Tr. 8). It is this aspect of the court's decision to which Goodjoin devotes most of his attention in arguing that the court abused its discretion in denying the motion to suppress. (Brief at 10-13).**

There is of course no question but that the defendant's testimony at the suppression hearing as to the various check-cashing transactions was at variance with the highly incriminating description he gave in his written statement. Similarly, there is no question but that Goodjoin erred in his statement in a number of minor respects, such as in assigning dates to the various transactions. It is nonetheless true that the important details of the statement were corroborated in significant detail by the testimony and evidence at the hearing, and later at trial itself.

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* Noteworthy in this respect is the fact that it appears the agents had in fact seen Goodjoin on a prior occasion when he clearly was intoxicated. (S. 15-16, 184-85). His demeanor and appearance on that occasion were so substantially different from his appearance on February 7th, that the agents did not at first recognize him. (S. 20-21). On that prior occasion, the agents, seeing his drunken condition, made no effort to take any statement from him. (S. 16-17).

** Defense counsel was of course permitted pursuant to (8 U.S.C. § 3501(a) to bring out and develop all these factors at the trial in arguing the statement was involuntary and inaccurate. *See United States* v. *Barry*, 518 F.2d 342 (2d Cir. 1975), and he did so at some length in summation. (Tr. 310-30).

With respect to the first transaction, it is clear that the incident occurred almost exactly as Goodjoin described it in his statement, right down to the amount of the check, the correct names of all the various participants, the location and the sequence of events, including the conversation between Hickey and the defendant and the manner in which the defendant received the money.*

With respect to the second transaction as to which Goodjoin was convicted, it is noteworthy that except for the fact that Goodjoin deposited the check in October of 1974 and not in November,** the statement is accurate in every detail.***

With respect to the claimed inaccuracies regarding meetings between Dunn and Goodjoin on February 6th

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* Defendant's claim that the only correct detail in this part of the statement was the amount and the name on the check (Brief at 9) is a gross distortion of the record.

** Goodjoin incongruously now attacks the agents for failing to point out to him the obvious errors in his statement, such as the date of the bank transaction, while at trial he accused them of putting words in his mouth. Agent Marquez quite clearly explained, however, that the statement was in the defendant's own words insofar as possible and that they did not try to make him change any aspect of it to conform to the evidence they subsequently acquired. (Tr. 154-55).

*** The defendant makes much ado over the third and fourth transactions, in particular, the two transactions as to which the defendant was not charged and as to which the Government offered no evidence whatsoever. With respect to the third transaction, however, the defendant's own evidence revealed that he did cash such a check at O'Leary Bar from which $100 was deducted. O'Leary claims, however, that this was a check made out to Goodjoin and not to a third-party. (Tr. 208-09). With respect to the fourth check, it is clear that such a check was not deposited at the Knickerbocker bank. However, since the defendant was not charged with this check and the Government offered no proof with respect to other bank accounts, defendant can hardly sustain the claims he makes based on this fact.

and 7th, the evidence showed that Goodjoin did in fact meet or speak with Dunn on February 6th (S. 172) and only thereafter did the defendant call the agents.

In light of these facts, the court found that

> "although there are a number of discrepancies between the statement, Exhibit 2, and the testimony of the defendant Goodjoin, there are many significant consistencies, particularly with respect to the precise amount of the $1286 check, the name of the payee and many of the circumstances of the endorsement nd cashing of that check as well as with respect to the approximate amount of the $620 check and the principal circumstances of its cashing." (S. 206).

The fourth and final factor which the court relied upon in concluding that the defendant acted knowingly and voluntarily in waiving his rights and making the statement was the Government's proof as to the events of June 10, 1975, when Goodjoin was arrested on these charges by Agent William McLain. At that time the defendant was again fully advised of his rights and executed a form acknowledging that fact as well as his decision to waive those rights. (S. 39-40, 44-45).* Goodjoin and the agent then went through the statement page by page and Goodjoin was asked if each page was correct or if there was anything he wished to change. The defendant indicated the statement was correct and signed

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* Although the defendant did not move to suppress the statement to the Assistant United States Attorney on June 10, 1973 or the February 7, 1975 statement as reaffirmed on June 10, after the Government introduced them at the suppression hearing, the defendant then testified he was intoxicated on that date as well. (S. 77-79, 160-63). The court rejected this claim in light of Agent McLain's testimony as to the defendants condition that day. (S. 207-08).

and dated each page. (S. 39-40). Thereafter, Goodjoin was taken to the office of an Assistant United State Attorney where he again was advised of and waived his constitutional rights, and made a staement, which the Assistant wrote down, corroborating the February 7th statement. (S. 42-43).*

Goodjoin does not claim that the court did not comply with the dictates of 18 U.S.C. § 3501 or of *Jackson* v. *Denno*, 378 U.S. 368 (1964), nor does he claim that the court applied the wrong legal test when it relied on *United States* v. *Silva*, 418 F.2d 328 (2d Cir. 1969).** The claim raised herein is simply that, based upon the evidence adduced at the hearing, the court abused its discretion in finding that the defendant acted voluntarily in making the statement of February 7, 1975.

However, it is well settled that at such a hearing, the Government need demonstrate "by a preponderance of the evidence that the confession was voluntary." *Lego* v. *Twomey*, 404 U.S. 477, 489 (1972). It is also clear that the determination of voluntariness is primarily one of fact, to be determined by the trial judge whose judgment is to be overturned only if clearly erroneous. See *United States* v. *Lucchetti*, Dkt. No. 75-1221, Slip op. 2351, 2367-68 (2d Cir., March 4, 1976); *United States* v. *Green*, 389 F.2d 949, 952 (D.C. Cir. 1967).

As the record in this case demonstrates, the court cannot possibly be said to have abused its discretion in finding that the defendant acted knowingly and voluntarily in waiving his rights and making the statement.

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* Although the Government introduced the waiver forms and this additional statement at the suppression hearing, it did not offer them at trial in view of their cumulative nature.

** See also *Townsend* v. *Sain*, 372 U.S. 293 (1963); *Blackburn* v. *Alabama*, 361 U.S. 199 (1960); *United States* v. *Bernett*, 495 F.2d 943, 967-70 (D.C. Cir. 1974).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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★ U. S. Government Printing Office 1976— 614—350—668

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JERRY L. SIEGEL being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 14th day of June, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Daniel L. Carroll, Esq.
Shea, Gould, Climenko & Kramer
330 Madison Ave.
New York, N.Y. 10017

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Jerry L. Siegel

Sworn to before me this
14th day of June, 1976

Lawrence Farkash

LAWRENCE FARKASH
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No. 24-4606580
Qualified in Kings County
Comm. Expires March 30, 1977